IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
June 27, 2006 Session

STATE OF TENNESSEE v. SUSAN MARIE GILLIAM CAMPBELL

Appeal from the Criminal Court for Hawkins County
No. CR552 James E. Beckner, Judge

No. E2005-01849-CCA-R3-CD - Filed November 21, 2006

The defendant, Susan Marie Gilliam Campbell, stands convicted of criminally negligent homicide and facilitating escape. The trial court sentenced her as a Range I, standard offender to two years for each conviction, with the sentences to be served concurrently for an effective sentence of two years in the Department of Correction. On appeal, the defendant assails the legal sufficiency of the convicting evidence at trial and argues that the trial court erred in admitting a tape recording of an Emergency 911 telephone call. After our review of the record and the parties' briefs, we affirm the defendant's convictions.

Tenn. R. App. P. 3; Judgments of the Criminal Court are Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and ROBERT W. WEDEMEYER, J., joined.

B.C. McInturff, Kingsport, Tennessee (at trial); and Greg W. Elchelman, District Public Defender (on appeal), for the Appellant, Susan Marie Gilliam Campbell.

Paul G. Summers, Attorney General & Reporter; Leslie Price, Assistant Attorney General; C. Berkeley Bell, District Attorney General; and Doug Godbee, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

This case arises from the drowning death of five-year-old William Blake Simpson on July 16, 2004, at Cherokee Lake in Hawkins County. The evidence at trial disclosed that the defendant had been "babysitting" the victim, who was her grandson, and another grandchild who was four years old. Without the permission or knowledge of the victim's mother, the defendant decided to take the children "swimming in Cherokee Lake." The defendant had never before taken the victim swimming. The defendant invited her boyfriend, Willie Mullins, and her 17-year-old son, Travis Gilliam, to accompany her to the lake. The group arrived at the Mooresburg boat ramp at approximately 3:00 p.m., and they waded through the water to a small island near the boat ramp.

Shortly thereafter, Michael Zar[1] and Carrie Hawley, who had driven separately to the lake, joined the defendant's group. The adults socialized while the children played. The jury heard numerous, conflicting versions of what happened during that outing leading up to the discovery that the victim was missing and including the subsequent search and rescue efforts.

Other adults and children were present at the lake that afternoon. Leanita Scott and her sister, Jeana Kenney, testified at trial and recounted what they observed. Ms. Scott explained that she and her sister had been "laying out in the sun" while her sister's two children swam and played. Ms. Scott saw the defendant's group arrive, and she said they "got a bunch of stuff out of the car," including a cooler, a raft, and other flotation devices. Ms. Scott observed the adults drinking beer, and when Zar arrived and got out of his truck, he had a beer with him. Ms. Hawley parked next to Zar's truck, and the couple walked to the island and joined the defendant's group. Ms. Scott testified that she and her sister were attired in bikini bathing suits. Zar and some of the other adults on the island began making rude comments to the sisters. Ms. Scott testified that at one point she observed the adults on the island smoking "a joint." She identified the "joint" based on its distinctive odor and because the adults were passing the "joint" among themselves. Ms. Scott also admitted that she and her sister had smoked marijuana earlier that day.

Ms. Scott testified that the victim and the other child "were just alone," walking along the bank of the island. Ms. Scott did not observe the children wearing life jackets or any "swimmies." She did see "a round, like, tube for a child" that the victim had around his torso, but the victim removed the tube and gave it to the younger grandchild. Ms. Scott testified that the defendant and some of the other adults began taunting the children, telling them to "get in the water." Several times the defendant told the victim that "he had to grow up sometime." Both children appeared extremely reluctant to go into the water.

The victim's disappearance came to Ms. Scott's attention after she and her sister asked the defendant's son if they could borrow his raft. The women went to the tip of the island, and Ms. Scott noticed the "little tube" on the ground. Ms. Scott asked the defendant the whereabouts of the victim, but the defendant did not know. Ms. Scott heard the defendant opine that the victim could not have traveled from the island to the lake bank. Ms. Scott and her sister then began diving into the water to search for the victim. When Ms. Scott last noticed the victim, he was not wearing any flotation device.

When the diving efforts proved futile, Ms. Scott left the water to telephone E 911. She testified that the adults "started to yell for [her] not to call the police, to wait . . . because [the defendant's son] was a fugitive . . . , and they didn't want [her] to call the police." Ms. Scott also heard the defendant tell other members of the group "to get [her son] out of there before the police got there because they would send him off or put him back in jail." Ms. Scott ignored the yelling

[1] Michael Zar and the defendant were tried jointly. The jury acquitted Mr. Zar of wrongdoing in connection with the victim's drowning death and in connection with facilitating the escape of Travis Gilliam, the defendant's minor son.

and placed a telephone call to E 911; as she was talking to an emergency dispatcher, Zar and the defendant's son went to Zar's truck as if to leave. Ms. Scott scolded Zar, telling him that she "couldn't believe he was going to leave with that little boy in the water." In response, Zar returned to the group, but Ms. Hawley then drove away with the defendant's son. The state introduced and played for the jury a tape recording of Ms. Scott's call to Larry Stroupe, the Hawkins County Emergency Communications dispatcher on duty that day.

Ms. Scott described the scene as "pretty chaotic." At one point, she noticed that the defendant was "digging around in her front seat of her car." Ms. Scott had leaned inside the car's window to find out the name of the victim, and as she did, the defendant was "pushing stuff . . . down in the seat." Ms. Scott also watched the defendant dispose of the group's cooler by hiding it in "some real tall weeds" near the defendant's vehicle. The defendant never went into the water to search for the victim.

Defense cross-examination of Ms. Scott was designed to highlight inconsistencies between her trial testimony and earlier statements and, in general, to besiege her veracity. She denied drinking any beer that afternoon and insisted that she was not intoxicated or "high." She did, however, retract her statement regarding being able to smell the marijuana being smoked by the parties in the defendant's group, but she maintained that she was, nevertheless, able to identify the substance. Ms. Scott agreed that she told the E 911 dispatcher that everyone was in the water looking for the child, but she insisted on cross-examination that neither the defendant nor her son went into the water. In Ms. Scott's opinion, the adults in the defendant's group were "drinking instead of watching the kids." Ms. Scott had no knowledge where, when, or how the victim got into the water.

Jeana Kenney testified and confirmed that Zar had taunted the victim, telling him not to be "a pussy your whole life." When Ms. Kenney last saw the victim, he was out "a little ways" playing on a pink raft that Hawley had inflated. Perhaps five minutes elapsed, and Ms. Kenney heard the defendant yell, "Where's Blake?"

On defense cross-examination, Ms. Kenney agreed that when she last saw the victim on the pink raft, she was not alarmed other than the victim was floating in deep water. Regarding her perceptions and sobriety, Ms. Kenney testified that earlier in the day she had taken three "draws off of a roach," but she denied drinking any beer. Moreover, Ms. Kenney maintained that even though she and her sister had been listening to music from their car radio, the music was not loud enough to prevent her from hearing Zar taunting the victim.

Rogersville Police Officer Chris Pinkston, who also was a diver for the Hawkins County Rescue Squad, testified about his rescue efforts. When he arrived at the scene, bystanders described the child's clothing, indicated the last place where the child was seen, and estimated that the child had been under water for approximately 30 to 45 minutes. Officer Pinkston devised a grid search pattern and began diving. Visibility in the water was poor, but he eventually identified an object that appeared to be a human body. A rescue squad boat at the scene then hooked the shorts

on the body with a drag line and lifted the body out of the water. Officer Pinkston identified the location where he spotted the body as approximately six feet from the island's shore and floating at a depth of approximately 10 feet. The officer testified that he focused more on putting on his gear and diving in the water than on identifying all of the witnesses at the scene. Similarly, he was not concentrating on whether evidence of marijuana smoking existed.

The state offered testimony of other emergency and law enforcement personnel involved in the search and investigation. Hawkins County paramedic supervisor Johnny Gulley testified that while he was driving to Cherokee Lake, the central emergency dispatcher notified him of "some complications at the scene" and ordered him to allow officers to "get on the scene first." Gulley estimated his drive time to the scene as 12 minutes, and when he arrived, the victim's body had not yet been located. Gulley testified that when the body was recovered, he knew immediately no possibility of resuscitation existed.

Jamie Miller, who was working July 16 with the Hawkins County Emergency Medical Services, testified that she spoke with the defendant at the scene. The defendant related that the victim needed flotation arm bands to swim but that the last time she saw the victim, he was not wearing the arm bands. Miller was unable to say whether the defendant appeared intoxicated; the defendant was excited and upset, "but not as much as [Miller would] expect for the situation."

Hawkins County Deputy Michael Allen spoke to Ms. Scott at the scene. Ms. Scott told him that the defendant had been drinking alcoholic beverages, and Ms. Scott directed Deputy Allen to the location of the inflatable cooler that the defendant had hidden in the brush off the shoreline. The deputy found the cooler and testified that it contained empty and partially full beer cans and "some rolling papers."

Deputy Allen also spoke with the defendant at the scene. He described her emotional demeanor as "withdrawn," but she was not crying. He identified Zar and Mullins as present when he spoke with the defendant; Hawley returned later to the scene. The deputy never saw a juvenile, but Ms. Scott had informed him that a juvenile had been present but left with Hawley.

On defense cross-examination, Deputy Allen agreed that he did not locate any marijuana in the area – just the package of rolling papers in the top of the cooler. Regarding whether any of the adults were intoxicated, the deputy explained that he focused on locating the victim and not determining who might be intoxicated. At one point, the defendant told him that she thought the child had come out of the water, and she speculated that he could be "wandering around in the woods" because he was a "hyper child."

Wayne Lovin, a law enforcement officer with the Tennessee Valley Authority, testified that he took custody of the cooler and its contents at the scene. He brought the items to court; they included five empty Natural Ice beer cans, five empty Michelob Lite beer cans, 11 full Natural Ice beer cans, and one full Michelob beer can. Officer Lovin also observed several discarded beer cans on the island, along with several styrofoam cups containing a yellowish liquid that he

believed to be alcohol. He also observed two life preservers, a float ring, and a "noodle" on the island. He did not find any evidence of marijuana smoking.

Officer Lovin's supervisor, Dewayne Broome, headed the Tennessee Valley Authority's criminal investigation division. His officers at the scene notified him that the drowning may have involved some negligence and not been purely accidental. Officer Broome drove to the scene where he interviewed the defendant and Mr. Williams. He first advised the defendant of her rights, and the defendant signed a form waiving those rights. Officer Broome summarized for the jury what the defendant told him in her interview. The defendant explained to him her relationship with the victim and that she had been babysitting the victim and another grandchild for the past two days. She identified the individuals in her group at the lake. The defendant related that the victim had been in the water nearly the entire time at the lake and that he had been wearing an inflatable ring around his waist before he "went missing." The defendant told the officer that she had asked the victim to remove the inflatable ring and put on a life jacket instead; the victim apparently did not do so. The defendant recalled seeing the victim standing near Hawley who was inflating a float, and she remembered that the younger grandchild began crying and asking for the victim to play with her. The defendant said that she was attending to the younger child, and when she turned her attention back to the victim, he was gone. She started screaming, and everyone present began searching for the victim. The defendant denied to Officer Broome that she told Ms. Scott "not to call the cops." Rather, the defendant insisted that she said, "Someone call the law."

During the interview, the defendant informed Officer Broome that her son had escaped from the Mt. View Juvenile Home near Johnson City. The son had been staying part time with her, and the defendant told the officer that he "won't do what anybody tell[s] him." Concerning the alcohol brought to the lake, the defendant claimed that her son did not drink anything, that she drank one-half can of Michelob Lite beer, and that Mullins consumed at least one beer. The defendant did not know how much beer Hawley drank that afternoon. The defendant specifically denied that she or anyone in her group smoked marijuana.

Three days after the drowning death, Officer Broome interviewed Zar who said that he and Hawley had been at the lake for approximately 30 minutes before the victim disappeared. Zar recalled seeing the victim wearing a blow-up ring around his waist and playing in the water. The victim took off the ring several times, but Zar maintained that each time the victim went back in the water, he put on the ring. Hawley was in the water blowing up a raft when the victim disappeared. Someone remarked that the victim had walked toward the land, and Zar claimed that he and the defendant's son went to the truck intending to drive and search for the child. Zar changed his mind and returned to the water to search. Hawley then drove away with the defendant's son; Zar told the officer that he thought Hawley and the defendant's son were headed toward the highway to look for the victim. Evidently, however, Hawley drove the defendant's son somewhere, and she returned to the lake alone. Zar denied using or seeing anyone else using marijuana; he only admitted to drinking two beers. He further denied making inappropriate comments to Ms. Scott and Ms. Kenney or taunting the victim.

The state called forensic pathologist Gretal Stephens to establish formally the victim's cause of death. Doctor Stephens performed the autopsy and testified that the victim experienced a "wet" drowning whereby the child actually inhaled water. The water contained some mud suggesting that the victim may have been close to the muddy bottom of the lake or to a sloping bottom in a shallow part of the water.

In support of the charge that the defendant facilitated the escape of her son, the state presented the testimony of the Director of Court Services for the Hawkins County Juvenile Court, Nancy Davis. Ms. Davis personally knew the defendant's son, and from the juvenile court records with her, Ms. Davis testified that Travis Gilliam was placed in the legal custody of the Department of Children's Social Services on March 13, 2003. Subsequently, Gilliam was prosecuted on delinquency charges, and he was placed in a Level 3 juvenile justice facility, which has the second highest security level. On May 8, 2004, Gilliam was given a "pass" to visit an ill grandmother who was in the hospital in Kingsport, and he escaped. Gilliam remained on escape status until February 2, 2005, when he was arrested and detained.

On cross-examination, Ms. Davis testified that "it was a pretty common practice for [Gilliam] to run away when . . . in custody."

At the conclusion of the state's case, the defense rested without presenting any proof. From the evidence elicited, the jury found the defendant guilty of criminally negligent homicide and facilitating escape; the jury fixed a fine of $1,500 for each conviction. The trial court sentenced the defendant to two years' incarceration for each conviction, with concurrent service of the sentences. The case is now properly before this court.

I. Sufficiency of the Evidence

The defendant assails the evidence at trial as legally insufficient to support her criminally negligent homicide and escape facilitation convictions. We measure those contentions with a familiar legal yardstick. When an accused challenges the sufficiency of the evidence, an appellate court inspects the evidentiary landscape, including the direct and circumstantial contours, from the vantage point most agreeable to the prosecution. The reviewing court then decides whether the evidence and the inferences that flow therefrom permit any rational fact finder to conclude beyond a reasonable doubt that the defendant is guilty of the charged crime. *See* Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92 (1979).

In determining sufficiency of the proof, the appellate court does not replay or reweigh the evidence. *See State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Witness credibility, the weight and value of the evidence, and factual disputes are entrusted to the finder of fact. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *Liakas v. State*, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956); *Farmer v. State*, 574 S.W.2d 49, 51 (Tenn. Crim. App. 1978). Simply stated, the reviewing court will not substitute its judgment for that of the trier of fact. Instead, the court extends to the State of Tennessee the strongest legitimate view of the evidence contained in

the record as well as all reasonable and legitimate inferences that may be drawn from the evidence. *See Cabbage*, 571 S.W.2d at 835.

With these principles in mind, we turn to the specific conviction offenses.

A. Criminally Negligent Homicide

To establish criminally negligent homicide, the state must prove three elements beyond a reasonable doubt: (1) criminally negligent conduct on the part of the accused; (2) that proximately causes; (3) a person's death. *State v. Jones*, 151 S.W.3d 494, 499 (Tenn. 2004); *State v. Farner*, 66 S.W.3d 188, 199 (Tenn. 2001) (citing T.C.A.[2] § 39-13-212(a) (defining criminally negligent homicide as "[c]riminally negligent conduct which results in death")). A person acts with criminal negligence with respect to the circumstances surrounding that person's conduct or the result of that conduct when the person ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. T.C.A. § 39-11-106(a)(4) (2003). "The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint[.]" *Id.* Furthermore, "[w]hen the law provides that criminal negligence suffices to establish an element of an offense, that element is also established if a person acts intentionally, knowingly or recklessly." *Id.* § 39-11-301(a)(2); *see State v. Roger Hostetler*, No. 02C01-9707-CC-00294, slip op. at 9 (Tenn. Crim. App., Jackson, Mar. 27, 1998) (pointing out reckless conduct occurs when actor is aware of but consciously disregards a substantial and unjustifiable risk, whereas criminally negligent conduct occurs when actor ought to be aware of the substantial risk; thus, an accused who engages in conduct under the circumstances that he knows, or should know, will create a substantial and unjustifiable risk commits an act with criminal negligence).

To be criminally negligent, a defendant must fail to perceive a substantial and unjustifiable risk. *Roger Hostetler*, slip op. at 11; *see also State v. Owens*, 820 S.W.2d 757, 760 (Tenn. Crim. App. 1991). Whether the defendant failed to perceive the risk must be determined under the circumstances as viewed from the accused person's standpoint. T.C.A. § 39-11-106(a)(4) (2003); *see also State v. Slater*, 841 S.W.2d 841, 842 (Tenn. Crim. App. 1992) (stating that the criminally negligent homicide statute "views the situation through the eyes of the [defendant] and whether he could have perceived and then chosen to ignore a 'substantial and unjustifiable risk'"). Even so, we do not regard the accused person's standpoint as "inject[ing] a totally subjective element

[2]The definitive style guide for legal citation in the United States is THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et. al. eds., 18th ed. 2005). The current 18th edition directs that local citation rules take precedence over *Bluebook* rules. For Tennessee, THE BLUEBOOK references "Tenn. Code Ann. § 1-2-101(a) (2003) ('cite as')." That Code section provides as follows: "This compilation of the laws of the state is to be designated as the 'Tennessee Code' and the annotated edition of the code provided for by chapter 1 of this title shall be designated as 'Tennessee Code Annotated' and abbreviated and cited 'T.C.A.'" Henceforth, the author of this opinion will employ "T.C.A." in citation sentences and citation clauses.

into the analysis, such that the defendant is exonerated if he acted in good faith or, in fact, just failed to discern the risk." *Roger Hostetler*, slip op. at 12 n.3. The defendant's failure to perceive the risk must be a "gross deviation from the standard of care." T.C.A. § 39-11-106(a)(4) (2003).

The defendant argues first that her reaction to the disappearance of the victim was outside the realm of criminally negligent homicide because the medical evidence established that the victim sustained a wet drowning and that once he inhaled the water he would have lost consciousness within seconds. A different reaction, the defendant claims, would not have rescued the child after he went into the water.

Second, the defendant maintains that by taking flotation devices and other buoyant materials to the lake, she demonstrated an awareness of the danger to the child of being in water without a means of flotation. Thus, she insists, no criminal negligence attends her conduct before arriving at the lake.

Last, the defendant concedes "that it was probably negligent to leave [the victim] while another adult was inflating a flo[]tation device in his presence but without being sure that a flo[]tation device was attached to the child." Nevertheless, the defendant argues that her negligent decision resulted in an "accident" and was not criminally negligent.

From the beginning, however, the defendant exhibited abysmal judgment in taking a five-year-old child to the lake without parental permission and ostensibly without knowledge of the child's experience with water.[3] Furthermore, common sense, to say the least, teaches that the risk of injury or drowning is likely and foreseeable when young children are not closely supervised when near water. The defendant acknowledges as much when she points to her awareness of the danger to a child being in water without a means of flotation.

The defendant does not address whether she was aware or ought to have been aware of a substantial and unjustifiable risk of harm or death to the victim arising from her consumption of alcohol and illegal substances, commonly known to impair the user's perception, judgment, and motor skills, considering that she was responsible for ensuring the safety of two young children who would be rendered helpless in water without a means of flotation. A rational jury, however, certainly could have found that the defendant's drinking and drug use while supervising children who could not swim constituted a gross deviation from the standard of care that an ordinary person would exercise and that the defendant knew or should have known that her conduct or the result of her conduct would imperil the life of the child.

In addition, we do not share the defendant's view that nothing she could have done would have rescued the victim once he went into the water. Abandoning search efforts and

[3] The victim's mother testified that the victim needed "floaties" around his waist and arms when swimming. She explained that she did not send any flotation devices with the victim to the defendant's home because she did not know that the child would be going to the lake.

attempting to thwart efforts to summon emergency personnel qualified as a gross deviation from the standard of care that an ordinary person would exercise.

Finally, a rational jury could have found that the defendant set into motion the chain of events that led to the victim's death and that the chain of events was a probable consequence of the defendant's conduct. Accordingly, we conclude that the evidence is sufficient to support the defendant's conviction for criminally negligent homicide.

B. Facilitating Escape

Relevant to this case, an individual commits the offense of facilitating escape who "intentionally or knowingly permit[s] or facilitate[s] the escape of a person in custody." T.C.A. § 39-16-607 (2003). Pursuant to Code section 39-16-601(2), custody means "under arrest by a law enforcement officer or under restraint by a public servant pursuant to an order of a court." *Id*. § 39-16-601(2). Escape means "unauthorized departure from custody or failure to return to custody following temporary leave for a specific purpose or limited period, but does not include a violation of conditions of probation or parole." *Id*. § 39-16-601(3)

The defendant maintains that although the evidence may support a conviction for providing some type of support to a fugitive from justice, the proof is simply inadequate to sustain a conviction for the charged offense of facilitation of escape. For its part, the state argues that the statutory definition of "escape" includes "failure to return to custody following temporary leave" and that the trial evidence showed that the defendant assisted Gilliam in not returning to custody. We agree with the state.

Escape is a continuing offense. *State v. Levy Tidwell*, No. 85-72-III, slip op. at 1 (Tenn. Crim. App., Nashville, Mar. 27, 1986). "The doctrine of continuing offenses states that every moment an offense is continued, the offense is committed anew." *State v. Legg*, 9 S.W.3d 111, 116 n.3 (Tenn. 1999). As evidenced by both the elements and nature of escape, it appears that the General Assembly intended for this offense to sanction a continuing course of conduct.

The evidence at trial showed that when Officer Broome interviewed the defendant at the lake, she told him that her son had escaped from the Mt. View Juvenile Home near Johnson City. She also explained that her son had been staying part of the time with her. From this evidence, a rational jury could conclude that the defendant had actual knowledge of her son's escape status. The evidence further showed that when Ms. Scott left the water to telephone E 911, she heard the defendant tell other members of the group "to get [her son] out of there before the police got there because they would send him off or put him back in jail." This testimony, which the jury was entitled to credit, established the defendant's direct involvement in facilitating her son's escape.

Consequently, we hold that the evidence is sufficient to support the defendant's conviction for facilitating escape.

III. Introduction of the Emergency 911 Tape Recording

In her third issue, the defendant is aggrieved by the admission of a tape recording of the E 911 telephone call placed by Ms. Scott after the adults discovered the victim had disappeared; the defendant characterizes the tape recording as a "Pandora's Box of irrelevant, immaterial information opened before the jury." We discern that the defendant's complaint is leveled at those portions of the tape recording wherein Ms. Scott references the defendant's callousness, drug use, and alcohol consumption.

At trial, the defendant objected on hearsay grounds to introduction of the tape recording through the Emergency 911 dispatcher. The trial court overruled the objection, noting the excited utterance exception to the hearsay rule and pointing out that both Ms. Scott and the dispatcher were present to be cross-examined. On appeal, the defendant does not pursue her earlier hearsay objection. Rather, relying on Evidence Rules 401, 402, 404, and 701, she argues that admission of the tape amounted to plain error.

Plain error review controls the defendant's new objections on appeal. Before an error may be so recognized, it must be "plain" and must affect a "substantial right" of the accused. The term "plain" equates to "clear" or "obvious." *See United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777 (1993). Plain error is not error that is simply conspicuous; rather, it is especially egregious error that strikes at the fairness, integrity, or public reputation of judicial proceedings. *See State v. Wooden*, 658 S.W.2d 553, 559 (Tenn. Crim. App. 1983).

In *State v. Adkisson*, 899 S.W.2d 626, 639 (Tenn. Crim. App. 1994), this court defined "substantial right" as a right of "fundamental proportions in the indictment process, a right to the proof of every element of the offense, and is constitutional in nature." In that case, this court established five factors to be applied in determining whether an error is plain:

> (a) the record must clearly establish what occurred in the trial court;
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> (b) a clear and unequivocal rule of law must have been breached;
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> (c) a substantial right of the accused must have been adversely affected;
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> (d) the accused [must not have waived] the issue for tactical reasons; and
>
> (e) consideration of the error must be "necessary to do substantial justice."

Id. at 641-42 (footnotes omitted). Our supreme court characterized the *Adkisson* test as a "clear and meaningful standard" and emphasized that each of the five factors must be present before an error qualifies as plain error. *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000).

Whatever else might be said, in our opinion even if the trial court, under some theory, erred in admitting the tape recording, appellate consideration of the error is not necessary to do substantial justice. Even without the tape recording, we regard as inevitable the introduction of testimony from eye witnesses about alcohol, drug use, and efforts to conceal the intoxicants. We agree with the defendant that these matters had a substantial effect upon the jury, but the eyewitness testimony was relevant. Furthermore, the trial court even cautioned the jury not to consider the opinions expressed on the tape recording by Ms. Scott, and jurors are presumed to follow the trial court's instructions. *See State v. Robinson*, 146 S.W.3d 469, 494 (Tenn. 2004).

For these reasons, we reject the defendant's claim of plain error in the admission of the Emergency 911 tape recording.

IV. Jury Instructions

The defendant's final issue is more in the nature of an acknowledgment or concession that the trial court's instructions on criminally negligent homicide were correct. The defendant's motion for new trial listed as error the failure to charge special request number one. We cannot tell from the cryptic comments during the hearing on the new trial motion the nature of the special request other than it evidently related to the criminally negligent homicide instruction. The defendant has failed to provide an appropriate reference to the record wherein we can review the special instruction, and we are unable to locate such an instruction. The issue – whatever it might be – has been waived. *See* Tenn. Ct. Crim. App. R. 10(b).

V. Conclusion

After careful consideration of the record and the issues presented, we find no plain error in the admission of evidence and affirm the defendant's convictions of criminally negligent homicide and facilitating escape.

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JAMES CURWOOD WITT, JR., JUDGE